

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Sep 12, 2022

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MARK C.,

Plaintiff,

v.

KILOLO KIJAKAZI,
COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

NO: 1:21-CV-03083-LRS

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND DENYING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

BEFORE THE COURT are the parties' cross-motions for summary judgment.
ECF Nos. 13, 14. This matter was submitted for consideration without oral
argument. Plaintiff is represented by attorney D. James Tree. Defendant is
represented by Special Assistant United States Attorney Benjamin J. Groebner. The

1 Court, having reviewed the administrative record and the parties' briefing, is fully
2 informed. For the reasons discussed below, Plaintiff's Motion, ECF No. 13, is
3 granted and Defendant's Motion, ECF No. 14, is denied.

4 JURISDICTION

5 Mark C.¹ (Plaintiff) filed for disability insurance benefits and supplemental
6 security income on May 21, 2019, alleging in both applications an onset date of
7 March 1, 2019. Tr. 382-89. Benefits were denied initially, Tr. 309-12, and upon
8 reconsideration, Tr. 318-31. Plaintiff appeared at a hearing before an administrative
9 law judge (ALJ) on September 8, 2020. Tr. 234-54. On October 8, 2020, the ALJ
10 issued an unfavorable decision, Tr. 29-46, and the Appeals Council denied review.
11 Tr. 1-7. The matter is now before this Court pursuant to 42 U.S.C. § 405(g).

12 BACKGROUND

13 The facts of the case are set forth in the administrative hearing and transcripts,
14 the ALJ's decision, and the briefs of Plaintiff and the Commissioner, and are
15 therefore only summarized here.

16 Plaintiff was 46 years old at the time of the hearing. Tr. 239. He graduated
17 from high school. Tr. 240. He has work experience as a cook. Tr. 240-41.
18 Plaintiff testified he has COPD and uses an inhaler three to four times a day. Tr.
19 241-42. He has supraventricular tachycardia (SVT) which is when his heart beats

20
21 ¹ Plaintiff's last initial is used to protect his privacy.

1 abnormally fast. Tr. 243. Plaintiff also has anxiety which is triggered by stress and
2 can cause SVT. Tr. 243. Twenty years ago, he witnessed a murder and ever since
3 has been withdrawn and unable to be around crowds of people. Tr. 244-45. At his
4 last job, he had a lot of issues with coworkers and customers. Tr. 245. His last job
5 ended because he had to go to the hospital for his heart issue. Tr. 247. Since then,
6 his heart has gotten worse, his breathing problem is worse, and his mental health and
7 anxiety intensify his health issues. Tr. 247.

8 STANDARD OF REVIEW

9 A district court's review of a final decision of the Commissioner of Social
10 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is
11 limited; the Commissioner's decision will be disturbed "only if it is not supported by
12 substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153, 1158
13 (9th Cir. 2012). "Substantial evidence" means "relevant evidence that a reasonable
14 mind might accept as adequate to support a conclusion." *Id.* at 1159 (quotation and
15 citation omitted). Stated differently, substantial evidence equates to "more than a
16 mere scintilla[,] but less than a preponderance." *Id.* (quotation and citation omitted).
17 In determining whether the standard has been satisfied, a reviewing court must
18 consider the entire record as a whole rather than searching for supporting evidence in
19 isolation. *Id.*

20 In reviewing a denial of benefits, a district court may not substitute its
21 judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152, 1156

(9th Cir. 2001). If the evidence in the record “is susceptible to more than one rational interpretation, [the court] must uphold the ALJ’s findings if they are supported by inferences reasonably drawn from the record.” *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court “may not reverse an ALJ’s decision on account of an error that is harmless.” *Id.* An error is harmless “where it is inconsequential to the [ALJ’s] ultimate nondisability determination.” *Id.* at 1115 (quotation and citation omitted). The party appealing the ALJ’s decision generally bears the burden of establishing that it was harmed. *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

FIVE-STEP EVALUATION PROCESS

A claimant must satisfy two conditions to be considered “disabled” within the meaning of the Social Security Act. First, the claimant must be “unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months.” 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). Second, the claimant’s impairment must be “of such severity that he is not only unable to do his previous work[,] but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy.” 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

1 The Commissioner has established a five-step sequential analysis to determine
2 whether a claimant satisfies the above criteria. *See* 20 C.F.R. §§ 404.1520(a)(4)(i)-
3 (v), 416.920(a)(4)(i)-(v). At step one, the Commissioner considers the claimant's
4 work activity. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If the claimant is
5 engaged in "substantial gainful activity," the Commissioner must find that the
6 claimant is not disabled. 20 C.F.R. §§ 404.1520(b), 416.920(b).

7 If the claimant is not engaged in substantial gainful activity, the analysis
8 proceeds to step two. At this step, the Commissioner considers the severity of the
9 claimant's impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If the
10 claimant suffers from "any impairment or combination of impairments which
11 significantly limits [his or her] physical or mental ability to do basic work
12 activities," the analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c),
13 416.920(c). If the claimant's impairment does not satisfy this severity threshold,
14 however, the Commissioner must find that the claimant is not disabled. 20 C.F.R.
15 §§ 404.1520(c), 416.920(c).

16 At step three, the Commissioner compares the claimant's impairment to
17 severe impairments recognized by the Commissioner to be so severe as to preclude a
18 person from engaging in substantial gainful activity. 20 C.F.R. §§
19 404.1520(a)(4)(iii), 416.920(a)(4)(iii). If the impairment is as severe or more severe
20 than one of the enumerated impairments, the Commissioner must find the claimant
21 disabled and award benefits. 20 C.F.R. §§ 404.1520(d), 416.920(d).

1 If the severity of the claimant's impairment does not meet or exceed the
2 severity of the enumerated impairments, the Commissioner must pause to assess the
3 claimant's "residual functional capacity." Residual functional capacity (RFC),
4 defined generally as the claimant's ability to perform physical and mental work
5 activities on a sustained basis despite his or her limitations, 20 C.F.R. §§
6 404.1545(a)(1), 416.945(a)(1), is relevant to both the fourth and fifth steps of the
7 analysis.

8 At step four, the Commissioner considers whether, in view of the claimant's
9 RFC, the claimant is capable of performing work that he or she has performed in the
10 past (past relevant work). 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). If the
11 claimant is capable of performing past relevant work, the Commissioner must find
12 that the claimant is not disabled. 20 C.F.R. §§ 404.1520(f), 416.920(f). If the
13 claimant is incapable of performing such work, the analysis proceeds to step five.

14 At step five, the Commissioner should conclude whether, in view of the
15 claimant's RFC, the claimant is capable of performing other work in the national
16 economy. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v). In making this
17 determination, the Commissioner must also consider vocational factors such as the
18 claimant's age, education, and past work experience. 20 C.F.R. §§
19 404.1520(a)(4)(v), 416.920(a)(4)(v). If the claimant is capable of adjusting to other
20 work, the Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
21 404.1520(g)(1), 416.920(g)(1). If the claimant is not capable of adjusting to other

1 work, analysis concludes with a finding that the claimant is disabled and is therefore
2 entitled to benefits. 20 C.F.R. §§ 404.1520(g)(1), 416.920(g)(1).

3 The claimant bears the burden of proof at steps one through four above.
4 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to
5 step five, the burden shifts to the Commissioner to establish that (1) the claimant is
6 capable of performing other work; and (2) such work “exists in significant numbers
7 in the national economy.” 20 C.F.R. §§ 404.1560(c)(2), 416.960(c)(2); *Beltran v.*
8 *Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

9 ALJ’S FINDINGS

10 At step one, the ALJ found Plaintiff has not engaged in substantial gainful
11 activity since March 1, 2019, the alleged onset date. Tr. 34. At step two, the ALJ
12 found that Plaintiff has the following severe impairments: tachycardia, coronary
13 artery disease, COPD, depressive disorder, obesity, and generalized anxiety disorder.
14 Tr. 35. At step three, the ALJ found that Plaintiff does not have an impairment or
15 combination of impairments that meets or medically equals the severity of a listed
16 impairment. Tr. 35.

17 The ALJ then found that Plaintiff has the residual functional capacity to
18 perform light work with the following additional limitations:

19 The claimant is able to lift and/or carry 20 pounds occasionally and 10
20 pounds frequently. He can stand and/or walk about 6 hours in an 8-
21 hour workday and can sit about 6 hours. He can frequently climb
ramps and stairs but only occasionally ladders, ropes, and scaffolds.
He can frequently stoop, kneel, crouch, and crawl. He can have

1 occasional exposure to hazardous machinery, unprotected heights, and
2 pulmonary irritants, such as fumes, odors, dust, gases, and poorly
3 ventilated areas. He can understand, remember, and carry out [sic]
4 simple, routine instructions with only brief and superficial interactions
5 with the public and occasional interactions with coworkers and
6 supervisors.

7 Tr. 37.

8 At step four, the ALJ found that Plaintiff is unable to perform any past
9 relevant work. Tr. 40. At step five, after considering the testimony of a vocational
10 expert and Plaintiff's age, education, work experience, and residual functional
11 capacity, the ALJ found that there are jobs that exist in significant numbers in the
12 national economy that Plaintiff can perform such as small product assembler,
13 production assembler, and routing clerk. Tr. 41. Thus, the ALJ concluded that
14 Plaintiff has not been under a disability, as defined in the Social Security Act, from
15 March 1, 2019, the alleged onset date, through the date of the decision. Tr. 42.

16 ISSUES

17 Plaintiff seeks judicial review of the Commissioner's final decision denying
18 disability income benefits under Title II and supplemental security income under
19 Title XVI of the Social Security Act. ECF No. 12. Plaintiff raises the following
20 issues for review:

- 21 1. Whether the ALJ properly evaluated Plaintiff's symptom claims;
2. Whether the ALJ properly evaluated the medical opinion evidence;
3. Whether the ALJ properly considered the lay witness evidence; and

1 4. Whether the Appeals Council properly considered evidence submitted after
2 the ALJ's decision.

3 ECF No. 13 at 2.

4 DISCUSSION

5 A. Symptom Claims

6 Plaintiff contends the ALJ improperly rejected his subjective complaints.
7 ECF No. 13 at 7-15. An ALJ engages in a two-step analysis to determine whether a
8 claimant's testimony regarding subjective pain or symptoms is credible. "First, the
9 ALJ must determine whether there is objective medical evidence of an underlying
10 impairment which could reasonably be expected to produce the pain or other
11 symptoms alleged." *Molina*, 674 F.3d at 1112 (internal quotation marks omitted).
12 "The claimant is not required to show that her impairment could reasonably be
13 expected to cause the severity of the symptom she has alleged; she need only show
14 that it could reasonably have caused some degree of the symptom." *Vasquez v.*
15 *Astrue*, 572 F.3d 586, 591 (9th Cir. 2009) (internal quotation marks omitted).

16 Second, "[i]f the claimant meets the first test and there is no evidence of
17 malingering, the ALJ can only reject the claimant's testimony about the severity of
18 the symptoms if [the ALJ] gives 'specific, clear and convincing reasons' for the
19 rejection." *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (internal
20 citations and quotations omitted). "General findings are insufficient; rather, the ALJ
21 must identify what testimony is not credible and what evidence undermines the

1 claimant's complaints." *Id.* (quoting *Lester v. Chater*, 81 F.3d 821, 834 (1995)); *see*
2 *also Thomas v. Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002) ("[T]he ALJ must make
3 a credibility determination with findings sufficiently specific to permit the court to
4 conclude that the ALJ did not arbitrarily discredit claimant's testimony."). "The
5 clear and convincing [evidence] standard is the most demanding required in Social
6 Security cases." *Garrison v. Colvin*, 759 F.3d 995, 1015 (9th Cir. 2014) (quoting
7 *Moore v. Comm'r of Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir. 2002)).

8 In assessing a claimant's symptom complaints, the ALJ may consider, *inter*
9 *alia*, (1) the claimant's reputation for truthfulness; (2) inconsistencies in the
10 claimant's testimony or between his testimony and his conduct; (3) the claimant's
11 daily living activities; (4) the claimant's work record; and (5) testimony from
12 physicians or third parties concerning the nature, severity, and effect of the
13 claimant's condition. *Thomas*, 278 F.3d at 958-59.

14 First, the ALJ found that Plaintiff's tachycardia and coronary artery disease
15 have not been treated except for medication management since the alleged onset
16 date. Tr. 39. The type, dosage, effectiveness and side effects of medication and
17 other treatment taken to alleviate pain or other symptoms as well are relevant factors
18 in evaluating the intensity and persistence of symptoms. 20 C.F.R. §§ 404.1529
19 (c)(3), 416.929(c)(3). However, it is not clear how Plaintiff's treatment reflects on
20 his allegations regarding limitations from his heart issues, as the ALJ did not discuss
21 the type or dosage of medication, other types of treatment which might be expected,

1 or any medical opinion evidence supporting the conclusion that Plaintiff's treatment
2 for his heart issues is not commensurate with his symptom claims. Further, the ALJ
3 found that Plaintiff's tachycardia and coronary artery disease "were shown to be
4 controlled with medications," yet records not available to the ALJ may indicate that
5 is not the case as he reported to the emergency room numerous times with rapid
6 heartbeat. *See e.g.*, Tr. 13, 81, 88, 130. Defendant does not respond to Plaintiff's
7 argument on this issue, ECF No. 14 at 4-8, and the court concludes the ALJ's
8 finding is insufficiently explained and supported.

9 Second, the ALJ found Plaintiff has made no changes in lifestyle or diet to
10 address his obesity and found that obesity does not have any specific effect on
11 function. Tr. 39. A person may have exertional or nonexertional limitations
12 resulting from obesity, and the combined effects of obesity with other impairments
13 may cause greater limitations than each of the impairments considered separately.
14 Social Security Ruling 19-2p, 2019 WL 2374244, at *4 (effective May 20, 2019).
15 As Plaintiff observes, while an ALJ may consider a claimant's failure to follow
16 prescribed treatment, this refers to treatment like medication, surgery, and therapy,
17 and does not include lifestyle modifications such as dieting, exercise, or smoking.
18 Social Security Ruling 18-3p, 2018 WL 4945641, at *3 (effective October 2,
19 2018). Even so, there is no evidence either that Plaintiff was directed to lose
20 weight as part of a prescribed treatment or any evidence that treatment would be
21 successful. *See Orn v. Astrue*, 495 F.3d 625, 637 (9th Cir. 2007). Additionally,

1 the basis for the ALJ's determination that there is no "specific effect" of obesity on
2 function is not adequately explained. Tr. 39. Defendant does not respond to
3 Plaintiff's argument on this issue, ECF No. 14 at 4-8, and the court concludes the
4 ALJ's finding is not supported by substantial evidence.

5 Third, the ALJ found Plaintiff's COPD, anxiety and depression are adequately
6 controlled with medication. Tr. 39. The effectiveness of treatment is a relevant
7 factor in determining the severity of a claimant's symptoms. 20 C.F.R. §§
8 404.1529(c)(3), 416.929(c)(3) (2011); *Warre v. Comm'r of Soc. Sec. Admin.*, 439
9 F.3d 1001, 1006 (9th Cir. 2006) (determining that conditions effectively controlled
10 with medication are not disabling for purposes of determining eligibility for
11 benefits); *Tommasetti v. Astrue*, 533 F.3d 1035, 1040 (9th Cir. 2008) (recognizing
12 that a favorable response to treatment can undermine a claimant's complaints of
13 debilitating pain or other severe limitations). Even if these findings are adequately
14 supported, the ALJ's errors regarding evaluation of Plaintiff's heart issues and
15 obesity mean the ALJ must reevaluate Plaintiff's symptom claims on remand.

16 **B. Medical Opinions**

17 Plaintiff contends the ALJ failed to properly weigh the opinions of David
18 Lindgren, M.D., and K. Mansfield-Blair, Ph.D. ECF No. 13 at 15-20.

19 For claims filed on or after March 27, 2017, the regulations provide that the
20 ALJ will no longer "give any specific evidentiary weight...to any medical
21 opinion(s)..." *Revisions to Rules Regarding the Evaluation of Medical Evidence*,

1 2017 WL 168819, 82 Fed. Reg. 5867-88 (Jan. 18, 2017); 20 C.F.R. §
2 416.920c. Instead, an ALJ must consider and evaluate the persuasiveness of all
3 medical opinions or prior administrative medical findings from medical sources. 20
4 C.F.R. § 416.920c(a) and (b).² Supportability and consistency are the most
5 important factors in evaluating the persuasiveness of medical opinions and prior
6 administrative findings, and therefore the ALJ is required to explain how both
7 factors were considered. 20 C.F.R. §§ 404.1520c(b)(2), 416.920c(b)(2). The ALJ
8 may, but is not required, to explain how other factors were considered. 20 C.F.R. §§
9 404.1520c, 416.920c.

10 ² Plaintiff asserts the “specific and legitimate” standard applies despite the new
11 regulations; Defendant argues to the contrary. ECF No. 13 at 15-16; ECF No. 14
12 at 8-9. A recent Ninth Circuit decision settles the matter: “While we agree with the
13 government that the ‘specific and legitimate’ standard is clearly irreconcilable with
14 the 2017 regulations, the extent of the claimant’s relationship with the medical
15 provider - what we will refer to as ‘relationship factors’ - remains relevant under
16 the new regulations.” *Woods v. Kijakazi*, 32 F.4th 785, 790 (9th Cir. 2022). The
17 court goes on to note the regulations provide, “We *may, but are not required to*,
18 explain how we considered the [relationship] factors... when we articulate how we
19 consider medical opinions . . . in your case record.” *Id.* at 791-92 (quoting 20
20 C.F.R. § 404.1520c(b)(2) (emphasis added)).

1 *1. David Lindgren, M.D.*

2 Plaintiff's primary care physician, David Lindgren, M.D., completed a
3 WorkFirst Documentation Request Form for Medical or Disability Condition in May
4 2019. Tr. 502-05. He diagnosed coronary artery disease, COPD, and anxiety, and
5 indicated that Plaintiff has limitations including difficulty breathing and anxiety that
6 can exacerbate his heart disease. Tr. 502. He opined that Plaintiff is capable of light
7 work, that he should work zero hours per week, and that the treatment plan includes
8 limited activity and medication. Tr. 503.

9 The ALJ found Dr. Lindgren's May 2019 opinion that Plaintiff can perform
10 light work persuasive and consistent with the record. Tr. 40. However, despite
11 crediting the opinion, the ALJ did not address Dr. Lindgren's findings regarding
12 limited activity and the combined effect of anxiety and heart disease. Tr. 40, 502-
13 03. It is error to disregard significant and probative evidence without comment. *See*
14 *Vincent v. Heckler*, 739 F.2d 1393, 1394 (9th Cir. 1984). On remand, the ALJ
15 should consider those findings and either explain how they are accounted for in the
16 RFC finding or reject them.

17 Dr. Lindgren completed a second WorkFirst form in July 2020. Tr. 527-29.
18 He indicated that Plaintiff has only diagnoses of depression and anxiety that require
19 special accommodations and that Plaintiff is limited to zero hours of work per week.
20 Tr. 527. He opined Plaintiff is limited in the ability to concentrate for extended
21

1 periods of time and in the ability to interact with people. Tr. 527. He also assessed
2 limitations on lifting and carrying and limited Plaintiff to sedentary work. Tr. 528.

3 The ALJ found Dr. Lindgren's July 2020 opinion unpersuasive because the
4 limitations are unsupported by citations to objective evidence. Tr. 40. The ALJ
5 found that Dr. Lindgren's records indicate a history of anxiety and depression, but
6 that exam findings indicate Plaintiff presented as "happy" with a full range affect,
7 intact thought processes and unremarkable content, good attention, and was fully
8 oriented. Tr. 40 (citing Tr. 531, 534). However, the ALJ cited treatment notes from
9 June 2019, more than a year before this opinion was rendered. Tr. 531, 534.
10 Treatment notes made contemporaneously with the opinion indicate, "[t]he patient
11 still has considerable anxiety and depressive symptoms He feels that he is doing
12 okay as long as he can stay at home and not need to leave the house." Tr. 537. The
13 records cited by the ALJ do not reasonably support the ALJ's conclusion. The ALJ
14 provided no other reason for finding Dr. Lindgren's 2020 opinion unpersuasive.
15 Thus, the ALJ should reassess the supportability and consistency of Dr. Lindgren's
16 2020 opinion on remand.

17 *2. K. Mansfield-Blair, Ph.D.*

18 Dr. Mansfield-Blair evaluated Plaintiff in July 2019 and diagnosed depressive
19 disorder and anxiety disorder. Tr. 517-22. She opined he would have no difficulty
20 performing simple and repetitive tasks, no difficulty accepting instruction from
21 supervisors, no difficulty interacting with coworkers and the public, no difficulty

1 performing work activities on a daily basis without special or added instruction, and
2 no difficulty dealing with the usual stress encountered in the workplace, but that he
3 would have difficulty maintaining regular attendance and completing a normal
4 workday/work week without interruptions from a psychiatric condition, given his
5 current lack of mental health treatment. Tr. 521-22.

6 The ALJ found that Dr. Mansfield-Blair's opinion that Plaintiff can perform
7 simple tasks is persuasive. Tr. 39-40. The ALJ found her opinion that Plaintiff has
8 no social limitations is not persuasive and assessed some limitations on interactions
9 with the public, coworkers, and supervisors. Tr. 37, 40. These findings are not
10 disputed by Plaintiff. ECF No. 13 at 19-20. Next, the ALJ found Dr. Mansfield-
11 Blair's opinion that Plaintiff would have difficulty maintaining attendance is not
12 persuasive. Tr. 40. The ALJ noted that Dr. Mansfield-Blair cited a lack of mental
13 health treatment as the basis for the attendance limitations, but the ALJ noted there
14 was "ongoing treatment and medication management by primary care." Tr. 40
15 (citing Tr. 537-611). Plaintiff contends this is not a sound reason for discounting
16 this limitation. ECF No. 13 at 20.

17 Plaintiff notes Dr. Mansfield-Blair had only one medical record to review,
18 ECF No. 13 at 20, which was an office visit note from Dr. Lindgren dated June 3,
19 2019. Tr. 533-34. Under the "Treatment" heading, "generalized anxiety disorder" is
20 listed followed by notes to "Continue Sertraline HC1 Tablet" and "Continue
21 Lorazepam Tablet" along with dosages. Tr. 533. Under the "History of Present

1 Illness” heading, Dr. Lindgren noted, “ANXIETY: Patient did well with increased
2 dose of sertraline. Currently 100 mg once daily. Anxiety seems to be improved
3 significantly. He continues on ½ mg lorazepam 3 times daily. He is using this fairly
4 regularly. He [sic] does continue to work well for him.” Tr. 534. Contrary to Dr.
5 Mansfield-Blair’s statement, Plaintiff’s mental health was being treated with
6 medication. Plaintiff asserts this misunderstanding by Dr. Mansfield-Blair cuts in
7 his favor, suggesting that he did not improve while being treated. ECF No. 13 at 20.
8 This argument is contradicted by Dr. Lindgren’s note which indicates Plaintiff “did
9 well” with an increased dose, that Plaintiff’s anxiety is “improved significantly” and
10 the medication “continues to work well for him.” Tr. 534.

11 Plaintiff argues the ALJ’s reasoning “has nothing to do with her workplace
12 limitations.” ECF No. 15 at 10. However, it was Dr. Mansfield-Blair who identified
13 a lack of treatment as the basis for the attendance limitation. The ALJ observed the
14 exclamation for the limitation is not supported by the medical record, which means
15 that Dr. Mansfield-Blair’s assessment of that limitation is unsupported. This is a
16 proper reason to disregard the limitation.

17 **C. Lay Witness**

18 Plaintiff contends the ALJ should have assessed lay witness evidence from
19 Plaintiff’s former brother-in-law, Brian R. ECF No. 13 at 20-21. An ALJ is not
20 required to articulate how he considered evidence from nonmedical sources under
21 the new regulations. *See* 20 C.F.R. §§ 404.1520c(d), 416.920c(d). The amended

1 regulations, however, do not eliminate the need for the ALJ to consider lay witness
2 statements. The ALJ did not mention the lay witness statement or otherwise
3 indicate it was considered. On remand, the ALJ should reference consideration of
4 the lay witness statement as appropriate.

5 **D. Evidence Submitted to the Appeals Council**

6 Plaintiff contends the Appeals Council erred by not properly considering 201
7 pages of evidence submitted after the ALJ's decision. ECF No. 13 at 4-7. When the
8 Appeals Council declines review, "the ALJ's decision becomes the final decision of
9 the Commissioner, and the district court reviews that decision for substantial
10 evidence, based on the record as a whole." *Brewes v. Comm'r of Soc. Sec. Admin.*,
11 682 F.3d 1157, 1161-62 (9th Cir. 2012) (citation and internal quotation marks
12 omitted). The "record as a whole" includes any new evidence made part of the
13 record by the Appeals Council. *Id.* at 1163. The district court must consider such
14 new evidence in determining whether the Commissioner's decision is supported by
15 substantial evidence. *Id.* at 1159-60. Denial of remand is appropriate
16 "notwithstanding the existence of new evidence only when there would be
17 substantial evidence supporting the ALJ's denial of disability benefits even if the
18 new evidence were credited and interpreted as argued by the claimant." *Gardner v.*
19 *Berryhill*, 856 F.3d 652, 658 (9th Cir. 2017). Since this matter is remanded on other
20 grounds, the records submitted after the ALJ's decision are part of the record for
21 consideration by the ALJ on remand.

CONCLUSION

Having reviewed the record and the ALJ's findings, this Court concludes the ALJ's decision is not supported by substantial evidence and free of harmful legal error.

Accordingly,


1. Plaintiff's Motion for Summary Judgment, **ECF No. 13**, is **GRANTED**.

2. Defendant's Motion for Summary Judgment, **ECF No. 14**, is **DENIED**.

3. This case is **REVERSED** and **REMANDED** for further administrative proceedings consistent with this Order pursuant to sentence four of 42 U.S.C. § 405(g).

IT IS SO ORDERED. The District Court Clerk is directed to enter this Order and provide copies to counsel. Judgment shall be entered for Plaintiff and the file shall be **CLOSED**.

DATED September 12, 2022.



LONNY R. SUKO
Senior United States District Judge